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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144
	)	
Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553

DOCKET FILE COPY ORIGINAL

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

CHADMOORE COMMUNICATIONS, INC.

Albert H. Kramer
Marjorie K. Conner
KECK, MAHIN & CATE
Penthouse
1201 New York Avenue
Washington, D.C. 20005
(202) 789-3423

Attorneys for Chadmoore Communications, Inc.

December 21, 1994

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SUMMARY

Chadmoore Communications, Inc. hereby requests that the Commission reconsider portions of the Third Report and Order in the above-captioned matter. Specifically, CCI requests that the Commission reconsider and rescind its rules relating to the licensing of 800 MHz facilities.

The Third Report and Order was adopted in response to Congress directive to implement symmetry in regulation of Commercial Mobile Services. The Commission's attempt to meet this challenge, however, exacerbates the disparity in regulation noted by Congress.

Because the Commission proposes to license 800 MHz facilities in large contiguous blocks of spectrum in large MTA/BTA geographic regions, the practical effect of the rules will be the licensing of facilities already occupied by incumbent 800 MHz licensees. It is clear from the Third Report and Order and from the Further Notice of Proposed Rulemaking arising from the Third Report and Order that the Commission will eventually require these incumbents to vacate the spectrum on which they now serve the public.

Rather than alleviating the disparity found by Congress, the Commission has now created yet another class of disparately regulated CMRS competitor. The three classes are incumbent 800 MHz licensees who face the auction of the very spectrum by which they compete in CMRS; the new entrants at 800 MHz who will pay for the authority to use the spectrum by which they will compete in CMRS; finally, incumbent cellular licensees who receive their authorizations without competitive bidding and who do not face the reallocation of the spectrum by which they compete in CMRS. Clearly, this is not what Congress intended.

The Commission, by its actions, affects the fundamental rights of incumbent 800 MHz SMR licensees. Although implementation of rules establishing symmetry of regulation in CMRS is within its discretion, it must choose a course of action which is reasonably related to the Congressional mandate and narrowly tailored to meet that goal. Wholesale restructuring of the 800 MHz industry is not an action which is narrowly tailored.

Moreover, the Commission relies on information in the record of the 800 MHz EMSP Notice to support the adoption of the rules. That record cannot support the rules set forth because it clearly limited the licensing proposal to the extent spectrum was available.

The Commission's actions do not serve the public interest in that they will interrupt and delay service to the public.

Additionally, the Commission adopted the freeze on acceptance of 800 MHz applications without following the formalities required by the Administrative Procedures Act and therefore the freeze cannot remain in effect.

Finally, CCI notes that the sunset of special temporary authorizations granted under Part 90 is discriminatory and improper and requests, at the very least, that the Commission allow the STAs to remain in effect pending the grant of major modification applications pending at the Commission now for some time.

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To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

Chadmoore Communications, Inc. ("CCI"),[1] by counsel, and pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. 1.429, hereby requests that the Commission reconsider portions of the Third Report and Order[2] in the above-captioned matter ("Third Report and Order"). In support of its request, CCI submits:

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[1] CCI has standing to Petition for Reconsideration, even though it did not participate in the earlier stages of this proceeding. FM Channel Assignments, 49 Rad. Reg. (P&F) 703 (B/cast Bur. 1981).

[2] Third Report and Order, 9 FCC Rcd ___ (1994).

I. Background

A. Disparate Services Become Competitors

The Commission established the Private Land Mobile Radio Services ("PLMRS") ("Specialized Mobile Radio" or "SMR") under Part 90 of its rules, in 1974 in the 800 MHz band. Since 1974, the SMR industry has grown and diversified rapidly. In recent years SMR service has matured into a diverse industry comprised of systems utilizing advanced technologies to provide an array of services. The services typically provided by an SMR operator range from traditional radio dispatch service for local customers to more sophisticated voice and data transmissions for customers over vast geographic areas. Existing 800 MHz SMR licensing rules provide for licensing on a site-specific and frequency-specific basis.

Since 1991, several 800 MHz SMR service providers have proposed consolidation and conversion of existing local analog systems into wide-area enhanced specialized mobile radio service ("ESMR") systems. The proposed ESMR providers have aggregated a significant number of channels in a given regional area and linked them in "daisy chain" fashion to create a contiguous service area.

In 1981, the Commission amended Part 22 of its rules to provide for the licensing and operation of cellular communications systems, Domestic Public Land Mobile Radio Services ("DPLMRS") ("Cellular") under Part 22 of the Commission's rules. Initially, licenses for blocks of 25 MHz were awarded on an MSA/RSA basis. The industry has grown providing basic mobile communications service to its customers.

Congress determined that SMR and Cellular provided like services, but are regulated differently. To remedy the perceived disparities in regulation of these like services, Congress amended Section 332(c) and (d) of the Act to provide that, to the extent SMR and Cellular provide equivalent mobile services, they will be consolidated into the Commercial Mobile Services and regulated in a similar manner.

B. The Commission's Attempt to Implement Symmetry in Regulation

On August 9, 1994, the Commission issued a News Release reporting the adoption of the Third Report and Order. Some six weeks later, on September 23, 1994,[3] the Commission released the text of the Third Report and Order. By the Third Report and Order, the Commission purported to "complete the initial implementation of Sections 3(n) and 332 of the Communications Act of 1934, as amended by Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993."[4] The Commission adopted rules purporting to establish regulatory symmetry among similar mobile services, including consolidation and reclassification of the Commercial Mobile Radio Services ("CMRS"), service area and channel assignment rules, technical specifications and a spectrum cap.

Purporting to respond to the Congressional mandate, the Commission has revised the structure for licensing CMRS facilities including 800 MHz SMR services to achieve what the Commission views as regulatory symmetry between 800 MHz SMR and Cellular services. The Commission adopted rules to license 800 MHz services by Major Trading Area

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[3] A summary of the text of the Third Report and Order was published in the Federal Register on November 21, 1994, 59 Fed. Reg. 59945.

[4] 9 FCC Rcd ___.

("MTA") and Basic Trading Area ("BTA") geographic regions rather than the site-specific licensing traditionally employed in the SMR services. The Commission will license a contiguous block of frequency to each licensee on an exclusive basis in its MTA or BTA. This scheme would more closely resemble the MSA/RSA licensing scheme utilized in Cellular, where each licensee is granted exclusive use of a 25 MHz block of spectrum.

In setting forth the wide-area MTA/BTA licensing scheme, the Commission established four elements: (1) large Commission defined service areas; (2) assignment of contiguous spectrum blocks to a single licensee on an exclusive basis; (3) use of construction and coverage requirements rather than loading requirements to ensure efficient use of the spectrum, and (4) technical and operational rules that afford maximum flexibility to locate, design, construct and modify facilities with one's licensing area, so long as no interference is caused to other licensees.

The linchpin of the Commission's scheme is the proposal to assign contiguous blocks of spectrum in the large MTA/BTA geographic regions. But as the Commission observed in Further Notice of Proposed Rulemaking,[5] "the 800 MHz band is heavily occupied in virtually all major markets and in many secondary markets and rural areas as well."[6] Further, in the Third Report & Order, the Commission cited Ericsson's comments, "here are no 800 MHz trunked SMR channels available in most markets."[7] Additionally, in light of the recent avalanche of applications for single-channel conventional (GX) facilities, CCI's experience

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5 9 FCC Rcd 2863.

6 9 FCC Rcd 2874, para. 32.

7 9 FCC Rcd ____, para. 93.

demonstrates that there are no 800 MHz SMR channels, trunked or conventional, available in most markets.[8]

It is clear, then, that because substantially no 800 MHz spectrum remains unoccupied, in order to assign contiguous spectrum blocks to new licensees on an exclusive basis within MTAs in BTAs, the Commission will have to displace the incumbent licensees already providing service on that same spectrum. It is also clear that if the Commission displaces licensees on two hundred channels in each designated trading area and has only eighty (80) lower channels for retuning the incumbents, and to which to "migrate" the incumbents,[9] sixty percent (60%) of the current licensees will be left with a valid license, but no spectrum on which to operate. Clearly, the rules as adopted fail to recognize that substantially all of the 800 MHz SMR spectrum is currently licensed and providing service to the public.

The rules as proposed create three different classes of competitors, each regulated differently.[10] This exacerbation of regulatory disparity among CMRS providers contravenes

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[8] For example, CCI has learned that the Commission authorized frequency coordinator, NABER, recently returned thirteen applications for single channel conventional facilities because no frequencies are available in Memphis, Tennessee - not a major market.

[9] It is also unclear how the Commission proposes to clear the lower 80 channels, which are currently substantially occupied.

[10] Specifically, the incumbent 800 MHz SMR licensee faces the auction of large blocks of spectrum in MTA and BTA geographic parcels. This proposal necessarily awards licenses to new entrants for the very spectrum on which these incumbents currently serve the public. The new entrants at 800 MHz will participate in competitive bidding. They will pay for the authority to use the spectrum by which they will compete in CMRS. Additionally, they will face the costs and delays associated with negotiating with and relocating the incumbent licensees. Finally, the incumbent cellular licensee has taken its authorization without participating in the competitive bidding process. The cellular incumbent does not face the re-allocation of its spectrum.

Section 332 of the Act. Implementation of the rules, then exceeds the Commission's authority to regulate CMRS.

II. The Licensing Rules Create Two Classes within the 800 MHz Spectrum

The proposed rules truly exacerbate the disparity among the regulation of the various CMRS players. The crux of this disparate treatment is the proposal to license not just remaining available spectrum, but all frequencies traditionally allocated to SMR and already occupied by service providers, by competitive bidding to a competitor of the incumbent SMR licensee. This proposal creates a third class of competitor. Sadly, these three classes of competitors do not play on a level field, despite the Commission's attempt at parity.

In implementing the CMRS licensing proposal, the Commission is adopting an auction in which the incumbents licensee's spectrum will be sold to the incumbent's competitor who is the highest bidder for the spectrum which the current SMR licensees use to serve their customers. This auction to the incumbents' competitors of the spectrum occupied by the incumbent creates a disparity between the incumbent and the competitor that is inconsistent with the statute and offensive to basic notions of fair play.

The Commission's decision to move to a system of licensing 800 MHz spectrum by MTA/BTA licensing threatens the very ability of the incumbent licensees to continue to compete. As explained above, because substantially all of the 800 MHz spectrum has already been licensed, future licensing of large blocks of 800 MHz spectrum, by MTA/BTA geographic divisions, will require incumbent licensees to relocate. The discussion of the Nextel proposal in the Third Report and Order[11] makes apparent, and the proposal set forth

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[11] 9 FCC Rcd __ - ___, para. 90-93, 102-106.

in the Further Notice of Proposed Rulemaking which grew out of the Third Report and Order[12], makes explicit, that the Commission will license spectrum already occupied by existing licensees, requiring the existing licensees to relocate.[13] This proposal is inconsistent with Commission policy and directly at odds with the Congressional mandate to achieve regulatory symmetry between and among CMRS providers.

Specifically citing Subpart S of Part 90 of the Commission's rules, that Part of the Commission's rules which governs the SMR industry, Congress assessed the wireless communications industry and found that private carriers had become functionally indistinguishable from common carriers. Clearly, Congress considers the incumbent licensees currently providing service to be CMRS competitors both among themselves and with cellular operators. It is the vigorous competition presented by these existing 800 MHz SMR licensees that prompted Congress to order symmetry between cellular and 800 MHz SMR.

In ordering competitive parity between the two services -- cellular and SMR -- Congress intended to order competition among all CMRS providers, including as among 800 MHz SMR operators. Yet the Commission's action creates a double competitive disparity for incumbent 800 MHz SMR licensees. The Commission will order incumbent licensees to migrate to a new portion of the spectrum, with all the attendant disruption, in order to

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[12] 9 FCC Rcd ____ (1994).

[13] If the incumbent licensees are not forced to relocate, at the very least, under the plan adopted by the Commission, they will be seriously constrained in the modification and expansion of their systems, artificially limiting their ability to compete in the CMRS marketplace.

auction the spectrum occupied by them to other 800 MHz SMR competitors. As a result, the newcoming SMR competitor will be able to serve much broader areas (MTA or BTA) and utilize much more spectrum (some block set aside by the Commission for its exclusive use) than the incumbents. The incumbents will be migrated to less desirable portions of the spectrum with far less available spectrum space and will be licensed on the traditional site-specific basis.

Similarly, cellular competitors of incumbent SMR operators will suffer none of the disruption associated with relocation. They will continue to have a wide coverage area, and will continue to be able to expand service within their assigned spectrum. If the Commission's proposal to assign, to newcoming competitors, exclusive occupancy of the channels currently occupied by incumbent licensees, is implemented, the incumbents will be forced to compete not only with Cellular licensees, but with an entity which would be granted the incumbent's very space in the spectrum, the incumbent's valid license notwithstanding.

The Commission may have authority to force its licensees to migrate to a different spectral position.[14] It is clearly beyond the Commission's authority in creating "regulatory symmetry" among CMRS providers to force an incumbent licensee, with a valid license and renewal expectancy, to move to an inferior channel position only to give over the incumbent's place to its competitor and place the incumbent at a competitive disadvantage.

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[14] See e.g. Personal Communications Services (Reconsideration of Second Report and Order) 75 Rad. Reg. 2d (P&F) 491, 9 FCC Rcd __ (1994).

In fact, the rules as adopted are in direct opposition with the mandate for parity among all CMRS providers.

III. The Rules Discriminate Between 800 MHz Licensees and Cellular Incumbents

In amending Section 332(c) of the Act Congress specifically classified SMR service providers meeting the relevant criteria and cellular service providers as a single class, Commercial Mobile Services. Congress intended that this single classification of all mobile services which are provided for profit and make interconnected service available to the public would result in regulatory parity among SMR service providers and cellular service providers.

The rules adopted by the Commission in implementing this symmetry of regulation, however, do not achieve a level playing field among these formerly disparate competitors. Again, there are two ways in which the Commission's rules fail to achieve the parity demanded by Congress.

As discussed above, incumbent licensees in the 800 MHz SMR frequencies must now suffer uncertainty and concomitant disruption as the Commission determines how it will make large blocks of spectrum available in MTA and BTAs. Under the newly adopted rules, at the very least, these incumbent competitors will be locked to their current transmitter sites with the exact number of channels, or fewer, licensed to them today. These incumbent competitors will have no flexibility to meet customer needs and certainly no capacity to grow. As a practical matter, in order to make the rules adopted by the Commission work, these incumbent competitors will be forced to relocate to the less desirable "lower 80" channels, when their highest bidding 800 MHz competitor takes its place on top of them.

There is no similar proposal to restructure and relicense the spectrum by which cellular competes in this marketplace. By the Commission's recent revisions of the rules, Cellular, in fact, will become more flexible and grow more easily to meet customer needs. Clearly, the Commission's rules do not provide a level playing field for these two services which today comprise CMRS.

Additionally, there is a palpable disparity between the licensing of the newcoming competitor at 800 MHz and the incumbent cellular licensee. Very simply, the newcomer will face payment of the high bid and any costs of negotiation and relocation of incumbent licensees on the spectrum acquired at auction, while cellular faces no auction. Further, during the time the newcomer is participating in auction, negotiating with the incumbent and constructing its new system, the cellular incumbent again is able to continue its agile, growing business in the marketplace. The Commission recognized the competitive disadvantage such a "head start" can cause. The Commission developed the head start doctrine to preclude a wireline licensee from obtaining an irreparable advantage over its non-wireline competitor in the same market due to the earlier provision of service.

Without a similar proposal to auction the spectrum licensed to incumbent Cellular licensees the auction of currently occupied 800 MHz spectrum contravenes the Congressional mandate to regulate all Commercial Mobile Radio Services ("CMRS") alike by creating disparate regulatory treatment between cellular providers and displaced SMR providers. Individual SMR providers are also illegally disadvantaged because they must pay for spectrum that cellular operators have acquired without a similar contribution to the

Commission's auction fund. These disparities clearly inhibit competition and contravene the Act in so doing.

IV. Adoption of the Licensing Rules is not Consistent with APA

A. The Rules Adopted do not Rationally Relate to the Mandate.

The Budget Act specifically orders the Commission to achieve parity between and among the traditional SMR and cellular services provider. The Commission has wide discretion in implementing its rules designed to achieve this regulatory parity. In doing so, however, the Commission developed rules which will necessarily affect the fundamental rights of incumbent licensees. When the Commission proposes to affect fundamental rights, strict scrutiny of the new rules is appropriate. Not only must the new rules be reasonably related to the goal of the Congressional Mandate, they must be narrowly tailored to meet the goal.

Clearly, the Commission's decision to license two hundred channels in each MTA/BTA already licensed to service providers is a decision which is not narrowly tailored to accomplish regulatory parity. Within its discretion, and consistent with the Commission's parity mandate, the Commission is free to protect the SMR incumbent and encourage it to grow. 800 MHz SMR licensees would then be free to form consortia and develop regional consortia to compete more effectively. This less restrictive means of accomplishing the parity's mandate would work and would preserve the traditional SMR operation.

B. The Record Does Not Support Adoption of the Rules.

In determining to license 800 MHz facilities on an MTA/BTA basis the Commission relied, in part, on comments solicited in the 800 MHz EMSP Notice.[15] It is important to note, as the Commission does, that the 800 MHz EMSP Notice proposed to license 800 MHz facilities on an MTA/BTA basis only to the extent such channels were available.[16] This limitation on the 800 MHz EMSP proposal is missing from the rules adopted in the Third Report and Order. Because of this material difference, the Commission cannot rely on the comments in the 800 MHz EMSP Notice to support its actions in the Third Report and Order. The Commission must reconsider its adoption of the MTA/BTA licensing scheme based solely on the comments received in the Further Notice of Proposed Rulemaking on which the Third Report and Order is based. Clearly, in the Third Report and Order proceeding, commenters questioned the wisdom of adopting Commission-defined licensing areas in view of the scarcity of available channels to serve the larger Commission defined areas.[17]

V. The Rules Will Interrupt and Delay Service to the Public

In all of its actions, the Commission must always consider the public interest standard. Traditionally, the determination that an action is in the public interest has been

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15 8 FCC Rcd ___.

16 9 FCC Rcd ____ at Para. 97.

17 See Citizens to Preserve Overton Part v. Volpe, 401 U.S. 402 91 S. Ct. 814, ___ L Ed. ___ (1971).

characterized by expedited implementation of new or improved service to the public.[18] The rules proposed for the award of 800 MHz licenses in the Third Report and Order would clearly result in an interruption of service currently provided and a delay in provision of new service as new licensees get into place and start up operations. Clearly, there is no guarantee that even if an applicant shows and bids at auction, it will ever provide service. Just as clearly, the existing licensees at 800 MHz have provided service. In fact, they have provided service so vigorously that Congress has determined that they should be regulated on par with cellular service providers, those competitors who are granted larger geographical and spectral territory to compete.

Now, the Commission has adopted rules which will destroy the SMR industry and replace it with new competitors at some point in the future only after interruption and delay. In determining that this was an appropriate course of action, the Commission must have assessed the costs in the short term compared to the benefit in the long term.

CCI urges the Commission to reconsider this cost/benefit analysis. In reconsidering this analysis, the Commission should be mindful of the significant competitive contributions incumbent 800 MHz licensees make to the wireless communications marketplace. These licensees are the entities which caused the industry to grow into a competitive threat to the much better financed, wide-area and block-spectrum licensed service provider. The incumbent 800 MHz licensee currently provides important service to the public, including

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[18] See Fleet Call, Inc. 6 FCC Rcd 1533 (1991) Advanced Mobile Phone Service, Inc. (LA Wireline Order), 93 FCC 2d 683 (1983).

sheriff, police, ambulance, school bus and other community and governmental users, as well as individual and fleet customers.

In assessing the trade-off for block spectrum MTA/BTA licensing, it is clear that the Commission is banking on the success of one or maybe two large service providers. The Commission must be mindful, however, that despite grant of wide-area licenses over two years ago, these ESMR licensees have not constructed any significant portion of their licensed systems. In fact, it appears that the equipment, the very foundation on which these ESMR proposals are based, does not work at the six times oversampling touted by industry pundits in various applications for special treatment before the Commission.

While the Commission has the discretion to sacrifice the short-term competitive advantages of experienced 800 MHz service providers to remain in place in the name of the long term goal of yardstick parity with cellular, CCI submits that 800 MHz licensees currently compete strongly with cellular. The trade-off in the name of yardstick parity is unnecessary and extremely cost-ineffective. The Commission must demonstrate that the uncertain benefits of its approach exceed the costs of the substantial disruption that will result from its chosen course of action. The Commission has failed to so substantiate its actions.

VI. The Freeze was Implemented Without Proper Notice.

On August 9, 1994, the Commission issued a News Release announcing the suspension of the acceptance of applications for new or modified 800 MHz facilities.[19] This

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[19] See Report No. DC-2638, "Regulatory Framework for CMRS Completed." This News Release specifically notes that "[t]he Commission further decided that in light of the changes to be implemented in 800 MHz licensing, acceptance of new 800 MHz SMR applications (including SMR applications for General Category channels) will be suspended, effective immediately, until

News Release, however, does not appear on the Commission's Daily Digest until August 10, 1994. Because the freeze is an agency statement designed to prescribe law, policy or procedure in relation to the acceptance of applications for 800 MHz SMR facilities, it is a "rule" within the meaning of Section 551(4) of the APA.[20] Section 552(a)(1) of the APA provides that each agency shall separately state and currently publish in the Federal Register for the guidance of the public the promulgation of such rules.[21] Section 553(d) of the APA

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new licensing rules are adopted.

[20] As a result of the implementation of the freeze, an application file by CCI to serve the Mid-South region was returned. CCI filed its Petition for Reconsideration of this action on October 8, 1994. That Petition for Reconsideration is attached hereto and incorporation by reference. Section 551(4) of the APA defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4).

[21] Specifically, Section 552(a)(1) provides that these items shall be published in the Federal Register:

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the *methods whereby*, the public may obtain information, make submittals or requests, or *obtain decisions*;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

prescribes that the required publication or service of a substantive rule shall be made not less than thirty (30) days before the proposed effective date.[22] In determining that promulgation of a rule is subject to the publication requirements, the U.S. Court of Appeals for the Fourth Circuit considered whether the rule "so directly affect[ed] pre-existing legal rights or obligations, indeed that [the rule] is of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect to any subject within its competence."[23] Because the Commission failed to give proper notice before implementing the freeze of the acceptance of 800 MHz applications, the freeze must be reconsidered and rescinded. Further, because it is a substantive Rule, the Commission was required to provide Notice & Opportunity for comment before adoption. This argument is

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> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
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> (E) each amendment, revision, or repeal of the foregoing.

See 5 U.S.C. § 552(a)(1). Emphasis added.

22 Except (1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency *for good cause found and published with the rule.* See 5 U.S.C. 553(d). Emphasis added. Clearly, under Batterton and Section 553(d)(3) of the APA, the Commission could have found good cause for implementing the freeze sooner than thirty (30) days from Federal Register publication. However, Section 553(d)(3) is explicit. If the Commission did find good cause for early implementation, it must publish that good cause with promulgation of the rule. The Commission did not do so. See Third Report and Order, 9 FCC Rcd __, para. 108, 415.

23 See Appalachian Power Co. v. Train, 566 F.2d 451, 455 (4th Cir. 1977). Citations omitted.

more fully developed in the Petition for Reconsideration of the return of the application attached hereto.

VII. Sunset of the Special Temporary Authorizations in SMR is Improper.

In paragraph 384 of the Third Report & Order, the Commission proposes to sunset all awards of Special Temporary Authority ("STA") under Part 90 of the Commission's rules. CCI is the manager of many facilities constructed pursuant to STA. These facilities were relocated from sites which became unavailable because the conduct of other lessees caused the tower owner to decide to discontinue leasing space to third parties. These circumstances were spelled out in the requests for STA. The requests were accompanied by the necessary affirmation by the licensee. Applications for permanent modification of the relevant facilities were filed, in most cases contemporaneously with the request for STA. Some of these applications have been pending before the Commission for over one year.

Because the STAs were properly obtained by a demonstration of good cause for the grant and for reasons beyond the control of the licensee, they should not be sunset just because they were granted under Part 90. CCI requests that the decision to sunset all Private Radio Bureau STAs be reconsidered and rescinded. In the alternative, CCI requests that the expiration be stayed for a reasonable period of time, giving the Commission time to process and grant the permanent modification applications currently pending at the Commission.

VIII. Relief requested

For the foregoing reasons, CCI respectfully requests that the Commission reconsider its decision to license 800 MHz spectrum formerly allocated to the SMR service by MTA/BTA and in blocks of spectrum. CCI requests that the Commission leave incumbent

800 MHz competitors in the positions occupied by them today. The Commission should accept site specific proposals which draw mutually exclusive applications after appearing on Public Notice which would then be granted by competitive bidding. CCI notes that this design for licensing the unoccupied 800 MHz frequencies will result in creative and strategic bidding. By implementing this scheme, the Commission will allow the marketplace to decide which system in which market should be constructed and placed into operation when. It would further leave the incumbent 800 MHz service providers in place providing service and competing on an even playing field with both cellular licensees and any other new entrant. Further, this proposal is consistent with the Congressional auction authority.

Respectfully submitted,

CHADMOORE COMMUNICATIONS, INC.

By: _____
Albert H. Kramer
Marjorie K. Conner

Its counsel

Keck, Mahin & Cate
Penthouse
1201 New York Avenue
Washington, D.C. 20005

(202) 789-3423

December 21, 1994

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF SECRETARY

In re Application of	)
	)
CHADMOORE COMMUNICATIONS, INC.	)
	)
For authority to construct	)
and operate an Enhanced	)
Specialized Mobile Radio System	)
to serve areas in Arkansas,	)
Missouri and Tennessee	)

To: Chief, Land Mobile Branch
Licensing Division
Private Radio Bureau

PETITION FOR RECONSIDERATION

CHADMOORE COMMUNICATIONS, INC.

Albert H. Kramer, Esq.
Marjorie K. Conner, Esq.
KECK, MAHIN & CATE
1201 New York Avenue, N.W.
Washington, D.C. 20005-3919
(202) 789-3400

Attorneys for Chadmoore
Communications, Inc.

Dated: October 6, 1994

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SUMMARY

Chadmoore Communications, Inc. ("CCI"), petitions for reconsideration of the return of its application for an Enhanced Specialized Mobile Radio ("ESMR") system utilizing various 800 MHz frequencies, to serve areas in Arkansas, Missouri and Tennessee (the "Mid-south ESMR"). In support of its petition, CCI respectfully submits.

On August 10, 1994, CCI submitted its application for the Mid-south ESMR. On August 9, 1994, the Federal Communications Commission issued a News Release announcing the suspension of acceptance of acceptance of applications for new or modified 800 MHz facilities. On September 6, 1994, the Commission returned CCI's Mid-south ESMR application without action because "[i]n its adoption of the Third Report and Order in GN Docket 93-252, the Commission suspended effective August 10, 1994, the acceptance of new 800 MHz SMR applications." On September 23, 1994, the Commission issued the full text of the Third Report and Order in GN Docket 93-252.

The Commission's haphazard actions in this proceeding have resulted in substantive harm to CCI with respect to its application for its Mid-south ESMR. Because its practical effect on CCI is substantive and not procedural, the implementation of the freeze violates Section 553(b) of the Administrative Procedures Act ("APA"), 5 U.S.C. § 553(b). In light of its substantive effect, the freeze is subject to the notice and comment provisions of the APA. Implementation of a substantive rule without an opportunity for notice and comment is a violation